No. 10-864

IN THE

Supreme Court of the United States

BILL HARBERT INTERNATIONAL CONSTRUCTION, INC., HARBERT INTERNATIONAL, INC., AND HARBERT CORPORATION,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF

JUNE ANN SAUNTRY
BRYAN B. LAVINE
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E.
Suite 5200
Atlanta, GA 30308
(404) 885-3210

CHARLES S. LEEPER
MICHAEL R. MINER
MARK H. M. SOSNOWSKY
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W.
Suite 1100
Washington, DC 20005
(202) 842-8800

ALFRED W. PUTNAM, JR.
Counsel of Record
D. ALICIA HICKOK
DRINKER BIDDLE & REATH LLP
One Logan Square
Suite 2000
Philadelphia, PA 19103
(215) 988-2700
Alfred.Putnam@dbr.com

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D C. 20002

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REPLY BRIEF

Although the Brief of the United States in Opposition ("Opposition") leaves several issues raised by Petitioners unaddressed, it advances some arguments that it contends militate against granting the Petition. Specifically, the government urges the Court to deny the Petition because (1) the question presented can be addressed (if it needs to be) after the new trial ordered by the Court of Appeals; (2) the retroactive application of the law does not affect very many litigants; (3) the retroactive application of the law is of no "practical" importance in any event because Petitioners will still face the relator's claims; and (4) regardless of whether retroactive application

of the law was appropriate, the Fraud Enforcement and Recovery Act of 2009 ("FERA") did not change the law, but merely clarified it. Petitioners address each of these points in this Reply.

I. If Petitioners Are Right That The Government's Claims Are Barred By The Statute Of Limitations, They Plainly Need Relief Now And Not Following A Second Trial In Which The Government Remains A Party.

The government argues that the Petition is somehow premature and that this Court can wait to consider the question (should it be inclined to do so) until after the second trial ordered by the Court of Appeals. The question now presented relates to Petitioners' conduct during the 1980s and early 1990s and the failure of the government to allow any notice of those claims until 2001. It is ironic that the government, which sat on its rights until the statute had run, now urges the Court to wait until after yet another trial (and, the government suggests, appeal) before reaching the issue that is clearly presented today.

In *United States v. Oregon Lumber Co.*, 260 U.S. 290, 301 (1922), this Court disapproved the idea "that one shall be twice vexed for one and the same cause." The Petitioners here have already had to endure a long and unquestionably vexing trial on claims made against them – a trial that took place in 2007. If Petitioners are correct that the government forfeited its right to bring claims in the case, it is no relief at all to require Petitioners to endure a second lengthy trial, with the government still participating as a party, before this Court considers whether all of the government's False Claims Act ("FCA") claims were time-barred. Indeed, the government's proposal to

further delay resolution of this issue is a prescription for a *third* trial. If the government does not belong in this case, this is the time to say so. *See United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945) ("The cause was remanded for trial in accordance with the ruling of the Circuit Court of Appeals. We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case").

Moreover, even though the Court of Appeals "did not literally end the case" by remanding for a new trial, it did enter a judgment that will bind the trial court on remand. *Mills v. Alabama*, 384 U.S. 214, 217 (1966). Accordingly, this Petition does not present some pretrial interlocutory request for review on a partially developed record. Waiting until after the second trial to address the timeliness of the government's claims would be a "roundabout process" attended by "an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court" resulting "in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." *Id.* at 217-18.

Finally, there is no doubt that this Court has jurisdiction to issue a writ of certiorari to review decisions of the Courts of Appeals before final rendition of judgment. 28 U.S.C. § 1254(1). And it has chosen to exercise that authority when appropriate. Indeed, this Court has not shied away from granting interlocutory review in FCA cases. *See, e.g., Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (reviewing denial of motion to dismiss). Because review of the Court of Appeals' relation back ruling is so obviously fundamental to the further conduct of this case, the Court should

exercise its authority under 28 U.S.C. § 1254(1) and grant the Petition.

II. The Language Congress Employs In Amending A Statute To Deprive Persons Of Rights Retroactively Is An Important Question, No Matter How Many Litigants The Amendment Appears To Affect.

The government minimizes the significance of the FERA amendments, intimating that there is only a finite set of litigants that could be affected. Opposition at 14. But the significance of an issue is not measured solely by how many persons might confront an identical question. For instance, in *INS v. Cardozo-Fonseca*, 480 U.S. 421 (1987), the Court reviewed the adoption of a standard of proof for asylum applicants, notwithstanding the fact that a recent amendment to the pertinent statute raised the prospect that even the petitioner's status might be adjusted. The Court found the petition not moot, both because it was unclear whether the petitioner could secure all relief she sought through the new procedures and because the alternative means of securing relief would take longer. *Id.* at 426 n.3. Both concerns are present here as well.

Supreme Court Rule 10 identifies considerations that inform this Court's decision whether to grant certiorari, considerations that include, *inter alia*, whether an important question of federal law has not been (but should be) settled by the Court. Sup. Ct. R. 10(c). In recent years, this Court has addressed a number of cases that address Congressional amendments with putative retroactive impact. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) (Title VII); *Hughes Aircraft Co. v. United States ex*

rel. Schumer, 520 U.S. 939 (1997) (FCA); *Lindh v. Murphy*, 521 U.S. 320 (1997) (AEDPA); *E. Enters. v. Apfel*, 524 U.S. 498 (1998) (Coal Act); *Martin v. Hadix*, 527 U.S. 343 (1999) (PLRA); *INS v. St. Cyr*, 533 U.S. 289 (2001) (IIRIRA); *Carr v. United States*, --- U.S. ---, 130 S. Ct. 2229 (2010) (SORNA). Just as the principles in these cases are used to construe other statutes, the principles this Court sets forth here will reach beyond FERA.

Indeed, this case presents the next logical step in the sequence of the Court's decision-making: it offers the Court the opportunity to address the confusion among the Courts of Appeals and district courts as to whether the *Ex Post Facto* clause or another protection against retroactivity precludes Congressional action to resurrect claims already time-barred under punitive statutory schemes such as the FCA.[1]

This Court's recurring concern with the scope of Congress's power to apply new rules of law to past conduct has especial significance here in light of the purpose of statutes of limitations:

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on

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[1] While it is true that much of the retroactivity debate triggered by FERA has concerned Congress's amendment in response to this Court's decision in *United States ex rel. Sanders v. Allison Engine Co.*, 553 U.S. 662 (2008), it is not true – as the government suggests – that the split in the circuits is confined to district courts. *See* Petition at 20, 23.

> notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

In this case, the relator's five-year delay before filing his Sealed Complaint, and the government's additional six-year delay in filing its Complaint in Intervention, resulted in "the very things that statutes of limitations are designed to prevent – loss of evidence, fading memories, [and] disappearance of documents." *United States ex rel. Miller v. Bill Harbert Int'l Const.*, 505 F. Supp. 2d 1, 19-20 (D.D.C. 2007) (App. 270a-271a). If the government's suggested construction were to be the law, the government could maintain a seal indefinitely, allowing the government exclusive control over when False Claims Act defendants receive initial notice that there are FCA claims against them. But the government's preferred construction cannot be squared with the fact that Congress did not remove the statute of limitations or its application to the government when it enacted FERA.[2]

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[2] The government suggests that Section 3731(c) cannot be characterized as retroactive legislation because it "does not 'impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" Opposition at 17. This conclusion would appear to have been foreclosed by *Stogner v. California*, 539 U.S. 607 (2003) and the cases discussed therein. As this Court explained, two of the characteristics of an *Ex Post Facto* law articulated in *Calder v. Bull*, 3 U.S. 386 (1798) – a law that aggravates a crime or makes it greater than it was when committed; and a law altering the legal rules or

III. The Ruling Of The Court Of Appeals Permitting The Government To Proceed With Its Contract 20A Claims Has Profound Legal And Practical Consequences For Petitioners' Case.

The government's Opposition attempts to minimize the impact of the retroactive application of 31 U.S.C. § 3731(c) on Petitioners, arguing that the relator would still be permitted to proceed with his claims even if FERA did not apply. Opposition at 10-11 ("[I]t is not clear how petitioners have been harmed. . . ."). The government's position that the ruling of the Court of Appeals "is of little or no practical consequence in this case" is belied by the government's continued efforts to preserve its stale claims. *Id.* at 10. There would be no reason for the government to persist in its efforts to resurrect these claims if it truly "does not matter" whether the government retries the claims or leaves them in the hands of the relator. *Id.*

And, of course, it does matter a great deal whether the government is allowed to pursue the claims asserted in its Complaint in Intervention. First, the government is wrong in describing its FCA claims as "substantially the same as the relator's." *Id.* at 10-11. For example, the government pleaded an alter ego theory of liability against Harbert Corporation, the passive owner of Harbert International, Inc. *See* Third Amended Complaint of the United States at ¶¶ 16-32. The district court, however, rebuffed the relator's attempt to add its own alter ego theory after discovery closed, reasoning that it would "unduly

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quantum or kind of evidence to convict – apply to changes to statutes of limitations. *Id.* at 611-12.

prejudice defendants" and would have required "even greater delay on top of discovery to allow the Court to assess whether the relator has successfully pleaded his alter ego theory as a matter of law." JAOR:0000254-255. In the event this Court rules that FERA may not be applied retroactively, only the relator's FCA claims would remain operative and – given plaintiffs' failure to muster any evidence of Harbert Corporation's direct liability during the 2007 trial – relator would be left to rely on his "enabling" theory of liability which, defendants have demonstrated, is plainly flawed. *See United States v. Bornstein*, 423 U.S. 303, 312 (1976).

Second, the substantial resources the government can bring to bear in a lengthy trial would undoubtedly give the relator a practical advantage that he plainly would not possess if proceeding on his own. *See E.E.O.C. v. Bd. of Regents of Univ. of Wisc. System*, 288 F.3d 296, 300-01 (7th Cir. 2002) (describing litigation against the United States as a "curse" because one "must square off against the power and majesty of the federal government" as compared to "an individual plaintiff, who almost certainly has limited resources"). The otherwise private character of the relator's claims would unquestionably be enhanced by the presence of the United States as co-plaintiff, particularly in a jury trial. *See United States v. Young*, 470 U.S. 1, 18-19 (1985) (recognizing that a government attorney bears the "imprimatur of the Government" and must be particularly cautious lest he "induce the jury to trust the Government's judgment rather than its own view of the evidence"). In sum, while it may be convenient for the government to argue here that it is of no "practical consequence" whether it remains a party on retrial, Opposition at 10, no one who has ever

tried a case against the government would find this argument even remotely plausible.

IV. The Government Waived Any Argument That Its Contract 20A Claims Properly Relate Back Under Fed. R. Civ. P. 15(c), Even Absent The Application Of FERA.

The government's Opposition correctly recounts that before FERA was enacted, the district court held that the government's 20A claims could proceed because they "related back" to the relator's 1995 complaint under Federal Rule of Civil Procedure 15(c). Opposition at 15. Petitioners challenged that ruling on appeal, arguing that the district court's Rule 15(c) holding was error because the lack of any notice of the relator's sealed complaint precluded relation back. Jt. Br. 31-40 (citing *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263 (2d Cir. 2006)).

The government *conceded* the Rule 15(c) issue in the Court of Appeals – a fact that the government's Opposition neglects to mention. *See* Brief of Resp. at 24-27 ("Defendants' *Baylor* argument . . . is . . . irrelevant"). Rather than addressing Petitioners' argument that the reasoning in *Baylor* prevented relation back under Rule 15(c), the government instead argued that FERA's amendments to the FCA retroactively resuscitated the government's expired claims. Brief of Resp. at 24-27. The Court of Appeals for the District of Columbia Circuit did not dispute *Baylor*'s holding. Having opted on appeal ***not*** to address Petitioners' challenge to the application of Rule 15(c), the government conceded the point in this Court. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n. 4 (2002) ("Because this argument was not raised below, it is waived"); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) ("We decline to address

this argument because respondent failed to raise it below and because the question it poses has not been adequately briefed and argued"). Indeed, even in this Court the government fails to cite, much less distinguish *Baylor*; nor does the government address *Baylor*'s holding that notice is the "core requirement" of Rule 15(c). 469 F.3d at 270.

Had the Civil Division of the Department of Justice investigated the relator's June 1995 allegations diligently and filed a complaint in intervention (or declined to intervene) later in 1995, Petitioners would have had the opportunity to prepare an effective defense. But the government's tactical delay of nearly six years before unsealing the relator's complaint resulted in the loss of Petitioners' principal witnesses to Alzheimer's disease, the fading of other witnesses' memories, and the intentional destruction of documents by government officials – a loss of evidence that defendants might have been able to preserve had they received timely notice of the claims and the opportunity to conduct discovery. *See* Petition at 6. Indeed, the six-year long sealing of the relator's complaint was not only incompatible with the core requirement of notice under Rule 15, but the district court recognized that Petitioners were demonstrably and grievously prejudiced by the unnecessary passage of time. *Miller*, 505 F. Supp. 2d at 19-20.

CONCLUSION

The government's FCA claims against Petitioners were time-barred until Congress added a relation back provision to the FCA while this case was on appeal following trial. The question presented here is whether Congress can revive time-barred claims in that way. It simply is not true, as the government contends, that the question – and the answer – do not matter. They do. Indeed, they matter a great deal not only to the litigants but to the public at large. For this reason, Petitioners respectfully ask that the Court grant their Petition and hear this case.

Respectfully submitted,

JUNE ANN SAUNTRY
BRYAN B. LAVINE
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E.
Suite 5200
Atlanta, GA 30308
(404) 885-3210

CHARLES S. LEEPER
MICHAEL R. MINER
MARK H. M. SOSNOWSKY
DRINKER BIDDLE &
REATH LLP
1500 K Street, N.W.
Suite 1100
Washington, DC 20005
(202) 842-8800

ALFRED W. PUTNAM, JR.
Counsel of Record
D. ALICIA HICKOK
DRINKER BIDDLE &
REATH LLP
One Logan Square
Suite 2000
Philadelphia, PA 19103
(215) 988-2700
Alfred.Putnam@dbr.com

Counsel for Petitioners